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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOAQUIN ESPINOSA TREJO,

Defendant and Appellant.

B207525

(Los Angeles County  
Super. Ct. No. BA309468)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Anne H. Egerton, Judge. Affirmed.

Anne Krausz, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M.  
Roadarmel, Jr. and Davis A. Voet, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Joaquin Espinosa Trejo appeals from the judgment entered after a jury convicted him of assault with a deadly weapon and found true related sentencing enhancements. He was sentenced to an aggregated term of 16 years in state prison. Trejo contends the trial court committed reversible error by denying his requests for substitution of counsel and for a brief continuance. We affirm.<sup>1</sup>

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. Facts*

The facts of the underlying offense are not relevant to the issues raised on appeal. Suffice it to say, the aggravated assault occurred in a Los Angeles restaurant on September 2, 2006, after Trejo confronted Robert Valdez and demanded to know his gang affiliation. When Valdez replied he was not a gang member, Trejo yelled, “Avenue 43rd bitch” and punched Valdez in the face. Valdez returned the punch, and a fight ensued, during which Trejo produced a knife and stabbed Valdez in the chest.

### *2. Procedural Background*

On October 17, 2006, Trejo was charged by information with one count of assault with a deadly weapon upon Valdez (Pen. Code, § 245, subd. (a)(1)).<sup>2</sup> It was further alleged Trejo personally used a deadly weapon in committing the offense (§ 12022, subd. (b)(1)), personally inflicted great bodily injury on Valdez (§ 12022.7, subd. (a)) and committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). At his arraignment the same day, Trejo was appointed a public defender, who represented him throughout the proceedings. Trejo pleaded not guilty and denied the special allegations.<sup>3</sup>

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<sup>1</sup> The parties agree the abstract of judgment should be corrected to reflect Trejo’s conviction by jury rather than by guilty plea.

<sup>2</sup> Statutory references are to the Penal Code.

<sup>3</sup> An amended information was filed on January 22, 1007, with additions not pertinent here, which did not change the charged offense and special allegations.

Following a November 14, 2006 pretrial conference, the case was set for jury trial on December 6, 2006 and thereafter trailed on the court's own motion to December 13, 2006. On that date, the People announced they were not ready for trial. The court granted a 30-day continuance.

On Thursday, January 11, 2007, the case was called for jury trial in the master calendar court. The People's motion to consolidate the trial of this case and Los Angeles Superior Court case No. BA310283 was heard and denied. The trial was trailed for one week.

On Thursday, January 18, 2007, which was day seven of ten, both Trejo and the People answered ready for trial in the master calendar court. Because of a possible negotiated plea, the trial was trailed to the following day. On Friday, January 19, 2007, the parties again answered ready for trial, and the case was transferred to the court assigned to conduct the jury trial. Trejo made a motion to relieve his appointed counsel (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), which the trial court heard and denied. Because there were no more prospective jurors available, the trial was trailed to 11:00 a.m. on January 22, 2007.

On Monday, January 22, 2007, the final day for trial (day 10 of 10) Trejo appeared in court with the public defender. As the day's proceedings began, the trial court was informed Trejo had retained counsel, who was present in the courtroom and asked to be substituted for appointed counsel. The trial court stated it would grant the request if counsel were ready to start trial that morning, adding that a motion to continue on the final day of trial would be considered untimely. Retained counsel said he was not ready to proceed, having been hired over the weekend, and would need a brief continuance. Counsel explained he was going to be out of town until Thursday (January 25, 2007), when he could appear on Trejo's behalf either in the trial court or, in the master calendar court if the People renewed their motion to consolidate Trejo's pending cases for trial. The People objected to continuing the trial, arguing they would be prejudiced because there was no guarantee their witnesses would be available on a later date. In response to

the court's inquiry, the public defender said Trejo had "no confidence" in his representation.

Although no formal motion for a continuance was made, because retained counsel stated he was not ready to proceed, the trial court treated the request for substitution of counsel as being conditioned on the granting of a continuance, and denied the motion as untimely. Before denying the motion, the court noted both parties had repeatedly answered ready for trial; and the case had been pending since October 2006, during which time Trejo had never sought to retain private counsel. Furthermore, this was the last day for trial, and a panel of prospective jurors had been ordered to report for trial that morning.

The remainder of January 22, 2007 was devoted to pretrial motions and jury selection. Trial testimony commenced the following day. On the morning of January 29, 2007, the jury returned its guilty verdict and true findings on the special allegations. Prior to sentencing, the trial court granted Trejo's written motion to substitute private counsel.

## **DISCUSSION**

Trejo contends he was denied his constitutional rights to counsel of his choice and to due process when the trial court refused to grant a continuance so his retained counsel could prepare for trial, effectively denying his request to substitute retained counsel.

"The right to the effective assistance of counsel 'encompasses the right to retain counsel of one's own choosing. [Citations.]' [Citation.] Underlying this right is the premise that 'chosen representation is the preferred representation. Defendant's confidence in his lawyer is vital to his defense. His right to decide for himself who best can conduct the case must be respected wherever feasible.' [Citation.]" (*People v. Courts* (1985) 37 Cal.3d 784, 789 (*Courts*)). The erroneous deprivation of a defendant's counsel of his choice is a structural error requiring reversal, and is not subject to harmless error analysis. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149-150 [126 S.Ct. 2557, 165 L.Ed.2d 409].)

“Generally the trial court has discretion whether to grant a continuance to permit a defendant to be represented by retained counsel. [Citation.]” (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.) “A continuance may be denied if the accused is ‘unjustifiably dilatory’ in obtaining counsel, or ‘if he arbitrarily chooses to substitute counsel at the time of trial.’ [Citation.]” (*People v. Courts, supra*, 37 Cal.3d at pp. 790-791) Trial courts should accommodate requests for continuances to obtain retained counsel “‘to the fullest extent consistent with effective judicial administration.’ [Citation.]” (*Id.* at p. 791.) In determining whether denial of a continuance is so arbitrary as to violate due process, courts look to the circumstances of each particular case, particularly the reasons presented to the trial court. (*Ibid.*)

There can be no question that Trejo’s request to substitute retained counsel, coupled with his request for a continuance, was untimely because it was made on the 10th day just before trial was to commence. And, there is nothing in the record to suggest Trejo had engaged in a good faith, diligent effort to substitute retained counsel in the time leading up to trial. First, during the nearly three months before trial, Trejo had the opportunity to substitute retained counsel if he desired, but he did not do so. Second, Trejo never presented the trial court with any reasons for waiting until the final day of trial to request substitution of counsel, such as being financially unable to retain counsel earlier.<sup>4</sup> An unexplained delay in retaining counsel does not establish good cause for

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<sup>4</sup> Although Trejo faults the trial court for “summarily denying” his request, he has presented this court with no authority that the trial court must inquire into the reasons for the delay in securing retained counsel, or must make a statement of reasons for refusing the substitution of retained counsel. To the contrary, it is up to a defendant or his retained counsel to justify an eve-of-trial or midtrial substitution of counsel. (*People v. Marsden, supra*, 2 Cal.3d at p. 123 [the right to the substitution of counsel is not absolute, in the sense that the court is bound to accede to its assertion without a sufficient showing that the right to the assistance of counsel would be substantially impaired in case the request is not granted, and within these limits there is a field of discretion for the court]; *People v. Jeffers, supra*, 188 Cal.App.3d at p. 850 [the same]; compare *Chandler v. Fretag* (1954) 348 U.S. 3, 10 [75 S.Ct. 1, 99 L.Ed.4] [the denial of a reasonable opportunity to employ and consult with counsel violates due process as guaranteed by the Fourteenth Amendment]; *Reynolds v. Cochran* (1961) 365 U.S. 525, 531, fn. 12 [81 S.Ct.

continuance. (*People v. Courts, supra*, 37 Cal.3d at pp. 790-791.) Third, Trejo never informed the court he was dissatisfied for any reason with his appointed counsel's performance or was seeking alternative retained counsel. It is true Trejo sought to relieve appointed counsel for the first time on Friday, January 19, 2007 on the eve of trial. However, Trejo's motion to relieve appointed counsel was made in the midst of failed plea negotiation, and after the People had withdrawn their previous offer of a 10-year state prison term. It appears from Trejo's comments during the *Marsden* hearing it was frustration with the People and failed plea negotiations, that motivated Trejo's request rather than dissatisfaction with appointed counsel's performance, after being content to proceed with appointed counsel the previous day. In any event, the trial court found Trejo's appointed counsel was providing effective representation, and when his *Marsden* motion was denied on January 19, 2007, Trejo never advised the court of his intention to retain counsel, although he knew trial was to begin on Monday, January 22, 2007.

Under these circumstances, the trial court properly found Trejo unjustifiably delayed his request to substitute retained counsel until the last day for trial, after both parties had repeatedly answered ready, witnesses had been subpoenaed, and a jury panel had been called to the courtroom. (See *People v. Blake* (1980) 105 Cal.App.3d 619, 623-624 [“[A] defendant who desires to retain his own counsel is required to act with diligence and may not demand a continuance if he is unjustifiably dilatory or if he arbitrarily desire to substitute counsel at the time of trial.”].) The trial court was properly concerned about the untimeliness of the request and the inability of retained counsel to immediately step in without delaying the trial. We agree with the trial court's finding that continuing the trial under the circumstances would have adversely affected the orderly administration of justice. (See *People v. Johnson* (1970) 5 Cal.App.3d 851, 859.)

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723, 5 L.Ed.2d 754] [the same]; *People v. Crovedi* (1966) 65 Cal.2d 199, 206 [there are no mechanical tests for deciding when a denial of a continuance to obtain retained counsel is so arbitrary as to violate due process; the answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied].)

There was no violation of Trejo's constitutional rights to counsel of his choice or to due process.

As for the cases upon which Trejo relies to support his claims of reversible error, none is analogous to the present case. Specifically, this case does not involve the filing of additional charges before trial, illness of the defendant or of chosen counsel, or any other circumstance beyond defendant's control. (See *People v. Crovedi* (1966) 65 Cal.2d 199, 207 [two-month continuance necessary because retained counsel was hospitalized]; *People v. Byoune* (1966) 65 Cal.2d 345, 347 [robbery charge added increasing seriousness of charges].) Nor can this case be compared to *Courts*, which held the trial court abused its discretion in denying the defendant's request for a continuance one week before trial to enable him to retain counsel to represent him against a murder charge. (*People v. Courts, supra*, 37 Cal.3d at p. 791.) The record established the defendant "engaged in a good faith, diligent effort to obtain the substitution of counsel before the scheduled trial date." (*Ibid.*) The defendant had contacted counsel two months before trial and spent the following weeks trying to raise the necessary funds for a retainer. (*Ibid.*) The defendant's attempt to conclude arrangements with counsel was delayed due to counsel's vacation. (*Id.* at p. 792.) Additionally, there was no showing a continuance would have significantly inconvenienced the court or the parties. (*Id.* at p. 794.) *Courts* contrasted the defendant's continuance request, made a week before trial, with cases in which defendants had made "eve-of-trial, day-of-trial, and second-day-of-trial requests" and courts had "found the lateness of the continuance [request] to be a significant factor which justified a denial where there were no compelling circumstances to the contrary." (*Id.* at p. 792.)

## **DISPOSITION**

The abstract of judgment is ordered corrected to show Trejo was convicted by jury trial rather than by plea. The judgment is affirmed.

**WOODS, Acting P. J.**

**We concur:**

**ZELON, J.**

**JACKSON, J.**